

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**ORIGINAL**

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

ROHINI KUMAR, an individual,)	Motions Hearing
on behalf of herself, the )	
general public and those )	
similarly situated, )	
)	
Plaintiff, )	
)	
vs. )	NO. C 14-02411 YGR
)	
SALOV NORTH AMERICA CORP., )	<b>Pages 1 - 20</b>
)	
Defendant. )	Oakland, California
_____ )	Tuesday, January 24, 2017

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

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Proceedings reported by electronic/mechanical stenography;  
transcript produced by computer-aided transcription.

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Tuesday, January 24, 2017

3:28 p.m.

P R O C E E D I N G S

**THE CLERK:** Calling civil action 14-2411, Kumar versus Salov North America.

Counsel, please state your appearances.

**MR. GUTRIDE:** Good afternoon, Your Honor. Adam Gutride on behalf of plaintiff and the class.

**MS. HAAC:** Good afternoon, Your Honor. Ana Haac, also on behalf of plaintiff and the class.

**MR. COMMONS:** Good afternoon, Your Honor. Sean Commons on behalf of the defendant.

**THE CLERK:** And so one of you stand in front of the mic, and there's a mic over here if you want, but don't stand in between.

(Pause in the proceedings.)

**THE COURT:** So I need you to discuss the *Bluetooth* factors, because, again, I've got concerns with this case.

**MR. GUTRIDE:** Okay. Thank you, Your Honor.

Forgive me if I get them in the wrong order, but the -- with regard to the amount that was at stake in this litigation and how the settlement relates to the amount at stake in litigation, our expert on the damages issue was Colin Weir.

He declared in the context of class certification that he had run a regression analysis of the prices in the marketplace for olive oil with representations about Italy on the bottle

1 and without representations about Italy and found that there  
2 was a modest price premium for the bottles that did have an  
3 Italian representation such that the potential damages that  
4 could be recovered by the class -- at that time we were  
5 talking about a California class -- was approximately  
6 \$1.2 million.

7 The defendant obviously disputes that analysis on a number  
8 of grounds. One of the grounds that they argue is that  
9 Mr. Weir is overestimating the amount at stake because he is  
10 including in the bottles that say something about Italy ones  
11 that have representation that the oil is 100 percent Italian  
12 and that that inflates the price differential between the  
13 bottles with and without statements about Italy.

14 Their view is that if you only combine -- compare the  
15 bottles that say "Imported from Italy" from the bottles that  
16 don't say anything or that just say "Imported," that there is  
17 no price differential.

18 We would have obviously had that fight at trial. The  
19 defendants also, by the way, have provided us data which we  
20 describe in the declarations in support of the settlement that  
21 when they changed their labels after the initiation of the  
22 case to remove the words "From Italy," that they did not  
23 change the pricing and that the pricing, if anything, has gone  
24 up.

25 So best case scenario is \$1.2 million. It -- It amounts

1 to an average of 34 cents per bottle.

2 **THE COURT:** So talk to me about the choice of a  
3 claims-made approach versus a coupon, because that's one of  
4 the things that I'm struggling with. And --

5 Let me look around you guys. All right. Not press.

6 **MS. HAAC:** No, she's with --

7 **THE COURT:** I suspect that some people in here before  
8 were, so --

9 But it is -- it is a concern in these consumer class  
10 actions, and it's something that I haven't quite settled on in  
11 terms of trying to figure out how these things need to work.

12 When you have a -- a settlement -- as you can see in the  
13 very first case that I dealt with, here is a product where the  
14 recovery, you know, if you could prove it, was \$55, right, a  
15 much bigger product than the bottle of olive oil that we're  
16 dealing with here.

17 On the other hand, I am a huge, huge user of olive oil.  
18 If I buy a particular brand, I'm buying three or four bottles  
19 at a pop. And certainly over the holidays, given the number  
20 of people we feed, I'm using lots of olive oil.

21 And especially if you're sophisticated enough to want to  
22 buy the extra virgin-type olive oil or the Italian olive  
23 oil -- my family in Texas can't believe how much time I spend  
24 in the olive oil section trying to figure out, you know, which  
25 is the better, et cetera.

1           So \$2? \$5? Who's going to -- Who's going to do anything  
2           for that kind of recovery? And if they're not and what we are  
3           trying to do here is promote better disclosures, more honest  
4           disclosures on products that we're approving, then why not a  
5           fund? I mean, I'm -- or why not a combination so that you  
6           have some real sustainable type of result?

7           **MR. GUTRIDE:** I think those are fantastic questions,  
8           Your Honor. And I just want to say that this is -- it's  
9           not -- they're not easy questions to answer. I'll do my best  
10          and I think also the defendants should also give -- defense  
11          counsel should give his view on those questions.

12          I will say this, though, that settlement is really about  
13          the art of the possible. And it happens in the context of  
14          what is likely to occur or -- or might occur at trial.

15          **THE COURT:** Right.

16          **MR. GUTRIDE:** So in this case, we have -- we have a  
17          person who the defendant argues is a terrible human being.  
18          Obviously, we take -- we take the facts differently on that.

19          We -- We have allegations that Your Honor saw fit to  
20          certify, which we obviously agree with, but they're not  
21          slam-dunks by any stretch.

22          The defendant says this product cleared customs every time  
23          so how can you possibly complain that there's a Tariff Act  
24          violations (sic). And they say that there's nothing  
25          misleading about this because, in fact, the main work is done

1 in Italy. It's where the people blend the oil and come --  
2 find out the right taste profile.

3 So we have a case like that. And even if we overcome all  
4 of those issues, we are likely to recover, at best, 34 cents  
5 per bottle.

6 And then, as Your Honor said in the -- in the class  
7 certification order, there would be some procedure by which  
8 people would then get their 34 cents per bottle. There'd be a  
9 claims process essentially. And they'd have to put in  
10 something -- at a minimum an affidavit. And perhaps Your  
11 Honor would be suspicious if somebody said, well, yeah, I  
12 purchased, you know, 10,000 bottles last year.

13 **THE COURT:** Well, maybe 10,000, but --

14 **MR. GUTRIDE:** Right.

15 **THE COURT:** But certainly not 12 -- you know, a  
16 bottle a month or something like that. Whoever knows?

17 **MR. GUTRIDE:** Well, 12 might be the right number, and  
18 that's why we said, you can get -- claim for up to ten bottles  
19 with no proof whatsoever.

20 And so that was where the -- that's where the kind of die  
21 fell on that. And that was hard fought. I will tell you we  
22 spent probably six hours on that -- that very issue of how  
23 many bottles could someone put in for proof -- with or without  
24 proof purchase and under what conditions and would it be 50  
25 cents or some other number. And there were many different

1 structures that were considered in that process.

2 The -- I -- even -- even though *Briseno*, as Your Honor  
3 pointed to in the other argument, you know, is a very  
4 favorable opinion for my side, I'm not sure that it resolves  
5 the ultimate issue of what happens after trial.

6 **THE COURT:** No, it doesn't at all. And I -- And it  
7 was clear that Judge Fletcher punted on that particular topic.  
8 I haven't talked to him about his punting. But, you know,  
9 that's why we're trial judges and they're judges on the Court  
10 of Appeal, 'cause they get to pronounce what it is we need to  
11 think about and do, and then we have to go figure out how to  
12 do it. But that's all right.

13 **MR. GUTRIDE:** So I've certainly had defendants argue  
14 to me and I -- I don't recall if it came up in this case.  
15 They've argued to the courts, in fact, that they have a due  
16 process right to challenge every claimant after trial and  
17 to -- to question the validity of that affidavit.

18 So if the person says, I purchased, you know, 35 bottles,  
19 to require them to, you know, come and be examined --  
20 cross-examined. I imagine Your Honor would reject that, but  
21 nevertheless, these are open questions, let's just say.

22 And as the last counsel said, we -- we do have a new  
23 appellate position being filled, so we don't know what's going  
24 to happen.

25 **THE COURT:** That's true, but I didn't say it in that

1 case, given the issues going on there -- the reality is that I  
2 suspect that we'll get a conservative just like we had a  
3 conservative so nothing will necessarily change, at least not  
4 this round in terms of where the Supreme Court was, so I'm not  
5 sure I buy that.

6 But it's -- there could be a change if there was something  
7 beyond the first appointment.

8 **MR. GUTRIDE:** Right. So, you know, our -- our view  
9 of this settlement is -- and just to get back to the very  
10 question -- you asked specifically about a common fund, so  
11 obviously we -- we start every negotiation demanding a common  
12 fund, and the -- we would prefer obviously to have as big a  
13 fund as possible and to have the money go -- if there's  
14 leftover money to go to *cy pres*. And the defendant's  
15 extremely resistant to that idea.

16 And there are things that need to be traded off in that  
17 context. So for example, you have a large fund, but then  
18 there are issues about, well, what are the proof of purchase  
19 requirements going to be? Is the defendant going to be -- is  
20 going to be less willing to do a more robust notice program,  
21 et cetera? So we are taking all of those things into account.

22 In this case, we got I think a very lenient proof of  
23 purchase requirement in that you can get \$5 with no proof  
24 whatsoever. And beyond that, you get \$2 just for filing a  
25 claim on the first bottle. That we have a extremely robust



1 notice program, where we have a claim administrator who's  
2 doing magazine advertisements and press release to thousands  
3 of publications and million -- hundreds of millions or hundred  
4 and fifty million online impressions.

5 We have an extremely simple claim form, which all that it  
6 requires essentially is your contact information and some  
7 approximate dates of purchase.

8 **THE COURT:** But this is something that has to be  
9 downloaded and mailed or -- I mean --

10 **MR. GUTRIDE:** No.

11 **THE COURT:** It can all be done online?

12 **MR. GUTRIDE:** Absolutely, Your Honor.

13 **THE COURT:** With an electric (sic) signature.

14 **MR. GUTRIDE:** Yes.

15 **MR. COMMONS:** Yes, Your Honor. We just have the  
16 download option for people who, for whatever reason, don't  
17 want to submit electronically.

18 **MR. GUTRIDE:** Right. And the -- Not only that,  
19 people -- even if you are submitting for more than \$5 and you  
20 have proof of purchase that you'd like to submit, you can do  
21 that online as well. There's a way to just upload your, you  
22 know, photograph that you take with your phone of your  
23 receipt, so it's a completely online process for people who  
24 want to do.

25 I've done several of these settlements now in the very

1 similar framework, and my experience is that you can complete  
2 the claim form and upload any proof of purchase, if you have  
3 any, in less than about two or three minutes.

4 **THE COURT:** I don't remember seeing the electronic  
5 piece in the agreement.

6 **MR. GUTRIDE:** Yes, Your Honor. I can point that out  
7 to you. It's in section -- Let's see.

8 It's Section 4.2, which says at the election of the  
9 settlement class member, claim forms may be submitted in paper  
10 via First Class mail or online at the settlement website.

11 And then it goes on to explain that for claim forms  
12 submitted online, the class member shall have the opportunity  
13 to upload proof of purchase image files, to preview and  
14 confirm information entered, and so forth.

15 The claim form, which is attached as Exhibit A, is a -- a  
16 mock-up which then specifies the information that will appear  
17 online versus paper.

18 And the way we did that is we had in brackets -- I'm  
19 sorry -- in kind of these curlicue brackets the information  
20 that would only be in the paper version, for example, the  
21 mailing address, but the online doesn't have that.

22 So the -- you know, we're -- we're certainly hopeful that  
23 there will be a significant number of claims.

24 I'll say one more thing about that, Your Honor, which is  
25 Your Honor pointed to the -- the goals of class action

1 litigation. And I think Your Honor mentioned that one thing  
2 that we're trying to do is to get the defendants to improve  
3 their practices, and we have done that in this case. They  
4 have, in fact, changed the labeling.

5 There is obviously a goal of a deterrent effect, and there  
6 are -- beyond the costs of paying claimants, the defendant is  
7 bearing pretty significant costs in this case, not only the --  
8 the cost of their extremely able counsel thus far, but also  
9 the costs of the notice, which is going to be very  
10 significant; the costs of administration, which will also be  
11 significant; the costs of paying claims and whatever  
12 attorneys' fees Your Honor sees fit to award to -- to  
13 plaintiffs' counsel.

14 **THE COURT:** And it sounded like you have done this  
15 particular procedure before, so what do you anticipate those  
16 costs to be in terms of real dollars, notice,  
17 administration --

18 **MR. COMMONS:** I --

19 **THE COURT:** -- et cetera.

20 **MR. COMMONS:** I could --

21 **MR. GUTRIDE:** I think the defendant knows actually.

22 **MR. COMMONS:** We expect that the notice and  
23 administration will cost \$450,000. And actually, that's --  
24 that is the -- the amount we've agreed to pay for our notice  
25 administration.

1           **THE COURT:** And in terms of your prior experience  
2 with claims done in this way, national consumer actions, is --

3           **MR. GUTRIDE:** Yes, Your Honor.

4           **THE COURT:** And so what do you anticipate?

5           **MR. GUTRIDE:** It's -- It's so hard to know, Your  
6 Honor. I think there is a very wide variance, but I  
7 certainly -- well, it's just -- it's so hard to know. I think  
8 that there will be tens of thousands of claims and perhaps  
9 hundreds of thousands of claims. Whether there would be more  
10 than that, I -- I don't know at this point. Perhaps.

11           **MR. COMMONS:** Your Honor, if I may, there was one  
12 point you'd raised that this is an appropriate time to address  
13 regarding the number of bottles that we have for -- without  
14 proof of purchase.

15           Your -- Your personal experience is a good example. In my  
16 household, too, it's sort of -- we buy three or four bottles  
17 at a time, not one or two. But we were balancing a couple of  
18 things.

19           And one of the theories that the defendant has or defense  
20 is, is that at some point, if you're buying a product, either  
21 you're buying it because you're loyal to our brand and that's  
22 the reason you're buying it. Or if you're a sophisticated  
23 consumer like yourself who's studying bottles, you would be  
24 reading the back. And our evidence was that 80 percent of the  
25 customers flip over the -- over the bottle to read the back.

1 And if that's the theory, then that's not a consumer who  
2 bought our bottle because of the words "Imported from Italy"  
3 on the front. They would have been buying it for some other  
4 reason, whatever that reason would be.

5 And the other reason for the ten number is that, again,  
6 while you or I or maybe some other smaller group of people  
7 purchase more regularly, most consumers' oil -- olive oil  
8 consumption is fairly low. It's --

9 **THE COURT:** Is what? I missed the last --

10 **MR. COMMONS:** It's fairly low. So people purchase  
11 one bottle every three to six months so the average is  
12 somewhere around two bottles a year. I understand if you're  
13 from a different background, your consumption --

14 **THE COURT:** Well, maybe the difference is California  
15 versus the rest of the nation. I mean, you know, I -- I don't  
16 know. I don't know if you've done those kinds of consumer  
17 surveys or not, but --

18 **MR. COMMONS:** Yeah, actually, California is not as  
19 much of an olive oil consumer as we'd like to think we are.  
20 There are couple other region (sic) in the country where there  
21 are more traditionally heavy olive oil users. It just happens  
22 to be that I think in certain parts of California, it's gotten  
23 a lot of attention. But it's still not as much of a food item  
24 as people might think.

25 So that's on the -- the ten, that's one issue.

1       The other one was on the claims process, I think counsel  
2       did address. It's not an issue we'd ever get away from  
3       because whether or not we litigated or we settle, we're going  
4       to have some process where people submit, and we did look for  
5       a way to make the claim form as simple as possible.

6       Your Honor, if you'd like I could go through the reasons  
7       we think that there wouldn't be basis for relief even if we  
8       went forward to litigate. But one case that's helpful, I  
9       believe, is the *Ben & Jerry's* case. This was an instance  
10      where the defendant showed after they removed "All Natural"  
11      from their ice cream container, the price didn't change.

12      And what the court essentially said, well, if the price  
13      didn't change, there isn't a basis for me to award  
14      restitutionary relief. Maybe there's a claim for injunctive  
15      relief -- well, actually there wouldn't be at that point  
16      'cause it came off, but if the essential finding is that  
17      you're not in a position to seek monetary recovery if the  
18      price isn't changing. And that's with the evidence we have.  
19      And that's a very strong factor in favor of settlement.

20      And as -- as far as *Briseno*, one thing that's sort of  
21      interesting about that decision and highlights the settlement  
22      process itself is that decision came down after the parties  
23      settled. And the law could change again.

24      And I don't know that the fairness of our settlement, when  
25      you're trying to account for both sides, fully informed at the

1 time, weighing the risks and benefits that could have occurred  
2 at that moment when they are settling --

3 **THE COURT:** Well, I'm not sure that's your best  
4 argument. I mean, I've heard some other arguments today that  
5 are -- that are helpful. But it is the state of the law, and  
6 I've not approved.

7 **MR. COMMONS:** No, I --

8 **THE COURT:** So I -- I approve given the state of the  
9 law.

10 Go ahead. You can finish up.

11 **MR. COMMONS:** No, that was -- I'll definitely move  
12 away from that one, Your Honor.

13 In terms of the products themselves and the amount that  
14 we're offering, these products typically sell for between four  
15 and six dollars an individual bottle. So, again, if you're  
16 looking at the prior case you're looking at before where the  
17 amount of the purchase is in the hundreds of dollars and it's  
18 some small fraction, even at 50 cents, that's a pretty  
19 significant portion of the overall price of the product when,  
20 of course, the defendants view is whether through *Daubert*,  
21 whether we got rid of the plaintiffs' claims, whether we  
22 disprove materiality or falsity or just by showing that the  
23 actual price hasn't changed over the last year and a half  
24 since the label has changed, all of those things would result  
25 in -- a trial could result in a -- in a -- an outcome where

1 the class gets zero.

2 **THE COURT:** I guess I'm not -- You control the price,  
3 so I don't exactly know how that argument cuts.

4 So you haven't change your price. So what? You know  
5 you're in litigation. You know that if you change your price,  
6 that might be used against you. I think the more relevant  
7 question is have your sales gone up or down.

8 **MR. COMMONS:** So I was referring to the average  
9 retail price, Your Honor, which is not the price we set.  
10 We -- We sell to other stores. They set the price in the  
11 marketplace. So I'm referring to the average retail price.

12 **THE COURT:** I see.

13 **MR. COMMONS:** As far as sales, my understanding is  
14 they're roughly the same.

15 **THE COURT:** All right. And then once again, I  
16 require 21 days to object before any hearing.

17 I also require attorneys' fees -- or attorneys to provide  
18 billing statements for the class to look at. Any problems  
19 with changing any of those deadlines or issues you want to  
20 discuss on that front?

21 **MR. GUTRIDE:** I think, Your Honor, the first point  
22 can be easily addressed in that we will just advance the date  
23 by which we file the motion for attorneys' fees by one week  
24 and keep all the other dates the same.

25 In other words, we'll file the final approval motion, the



1 motion for attorneys' fees, one week earlier than was  
2 specified in the proposed order.

3 On the second issue, we have no problem providing  
4 billing -- bills. I just want to make sure that I understand  
5 what Your Honor needs so that we protect any attorney-client  
6 information and work product information.

7 So what I would propose would be something in the form of  
8 summary bills. They could be on a monthly basis of the work  
9 that was performed or by -- or summaries of the work that was  
10 performed by activity. For example, work on a motion to  
11 dismiss or work on a deposition, et cetera. And the -- the  
12 total by timekeeper.

13 But if Your Honor wants daily records of each timekeeper  
14 with all of the detail, then there may be issues about having  
15 to redact fair amount of information.

16 **THE COURT:** Well, the submission that was provided to  
17 me in the first case was not sufficient. I can tell you that  
18 I've had -- and have looked at attorneys' records that are  
19 hundreds of pages long. And that gives me an insight into  
20 whether people are padding or not padding.

21 It kind of depends. If the -- If there is huge  
22 disproportionality, then that's going to be more of an issue.  
23 If there's less, it's going to be less of an issue.

24 **MR. GUTRIDE:** Okay.

25 **THE COURT:** So all I can tell you is it depends.

1           **MR. GUTRIDE:** Okay, Your Honor. And then one other  
2 question would be if we do admit the -- these -- all of the  
3 details, do you -- you mentioned transparency. Does that mean  
4 that you want all of those details to be posted on the  
5 settlement website and so forth? Or would there be the  
6 details to Your Honor under seal or in some other format and  
7 the summary form for the class members?

8           **THE COURT:** You know, it's interesting, people always  
9 want to keep this stuff hidden. And I'm not exactly sure why  
10 it should be hidden. Perhaps -- and, again, think again it  
11 depends.

12           If -- If the summaries are not so summary to give the  
13 class the information that it needs to really evaluate that,  
14 and you should assume that objectors are going -- can be  
15 lawyers, then perhaps summaries with the detail under -- under  
16 seal, under a request to seal are okay.

17           On the other hand, you represent the class. You represent  
18 all of them. They are your clients.

19           So perhaps people need to start thinking about keeping  
20 records in a way that after-the-fact redaction is not so  
21 onerous; that is, to keep your monthly billings, you know, one  
22 that is a publicly available attorneys' fees billing, and then  
23 separate document that you could indicate whatever  
24 attorney-client or work product issues would be appropriately  
25 redacted so that -- I mean, I understand going through years

1 of attorneys' fees bills and redacting out things that  
2 would -- would otherwise be properly redacted is -- is  
3 onerous.

4 But I do think that people need to start being more  
5 cognizant that this is an open public process where people  
6 have a right to know.

7 I think that general notion's under attack, and I -- I'm  
8 becoming, I think, much more strongly affiliated with  
9 openness.

10 **MR. GUTRIDE:** Okay. Thank you, Your Honor.

11 **THE COURT:** All right. I will think about this and  
12 be in touch soon unless there's anything else you want me to  
13 consider.

14 **MR. COMMONS:** The only thing, Your Honor, I mean, and  
15 this is -- I only raise this just to understand for a timing  
16 perspective because I understand from the settlement  
17 administrator that we have some deadline by which we need to  
18 make a placement order to be able to have publication notices  
19 go out.

20 And so I understand if the answer is nothing further than  
21 what you've already said, but if there's any guidance on when  
22 you might think you would have a further direction for us  
23 regarding the proposed is settlement, that would be helpful so  
24 I could communicate with the settlement administrator.

25 **THE COURT:** So what's your deadline?

1           **MR. COMMONS:** The 27th is my understanding.

2           **MR. GUTRIDE:** Yes. And my understanding is that all  
3 that has to happen by the 27th is that they have to pay for  
4 space. They don't need the actual text yet.

5           **THE COURT:** Okay.

6           And that's -- that is to meet the deadlines that are in  
7 your proposed form?

8           **MR. GUTRIDE:** Yes, Your Honor.

9           **THE COURT:** All right. I'll keep that in mind.

10          **MR. GUTRIDE:** Thank you, Your Honor.

11          **MR. COMMONS:** Thank you, Your Honor.

12          **MS. HAAC:** Thank you, Your Honor.

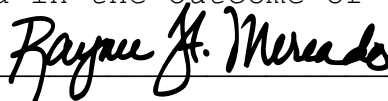
13          **THE COURT:** Thank you.

14               (Proceedings were concluded at 3:58 P.M.)

15                       --o0o--

16                       **CERTIFICATE OF REPORTER**

17           I certify that the foregoing is a correct transcript  
18 from the record of proceedings in the above-entitled matter.  
19 I further certify that I am neither counsel for, related to,  
20 nor employed by any of the parties to the action in which this  
21 hearing was taken, and further that I am not financially nor  
22 otherwise interested in the outcome of the action.

23                       

24           Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

25                       Monday, May 29, 2017